[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES.

No. 332.

OCTOBER TERM, 1895.

L. C. KARRICK, APPELLANT,

vs.

C. L. HANNAMAN, APPELLEE.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee brought this action against appellant in the Third Judicial District Court of Utah Territory for an accounting, for dissolution of partnership, and for judgment for appellee's undivided proportion of partnership profits. Judgment was rendered for appellee against appellant by the District Court; the Judgment was afterwards affirmed by the Supreme Court of Utah Territory, slightly modified. Appellant then brought the case to this court.

Appellee and appellant entered into a written agreement of partnership dated February 3, 1896, for the period of *five years*, to carry on a men's furnishing and laundry business; losses and gains to be equally divided; the written agreement is found on Record pages 3-4.

This case was referred by the District Court to Samuel A. Merritt (afterwards Chief Justice of Utah Territory) for trial; the referee made his findings of fact, conclusions

of law and decree, and the same were afterwards adopted by the District Court and are found on Record pages 20-26.

The findings support the judgment in every particular; and in such case this court by Mr. Chief Justice Fuller, in 151 U. S. 450, said:

> "* * * The Supreme Court, in affirming the judgment, has determined that the findings of the trial court were justified by the evidence, and, apart from exceptions duly taken to rulings on the admission or rejection of evidence, our examination is limited to the inquiry, without reference to the weight of evidence or its sufficiency to support the special findings, whether the decree can be sustained upon those findings."

To same effect, 160 U. S. 313 Haws, vs. Victoria Cop. Min. Co. and cases cited.

(We have not received a copy of appellant's brief, and hence are compelled to discuss the points relied upon in the Supreme Court of Utah.)

BRIEF AND ARGUMENT.

Appellant contends the partnership was dissolved because he took forcible possession; and that though a partnership be for an unexpired definite period, yet that either partner may terminate the partnership agreement at any time without cause.

The object, of course, of this contention is to bar the appellee from sharing in any profits after his wrongful exclusion.

There are two conclusive answers to the above proposition:

POINT I.

In the first place, where one partner wrongfully excludes his co-partner, retains the partnership assets and property, continues the business, and makes profits, he is bound to account to such co-partner either for his share of the profits or for interest on the capital, at the latter's option.

In 138 N. Y. 369, Holmes v. Gilman, an action was brought to obtain an accounting of the amount of the partnership funds wrongfully taken by one partner and invested in life insurance policies, and that the proceeds of such policies should be impressed with the partnership trust. The plaintiff was successful.

The court, by Peckham, Justice, on page 376, said:

> "The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a *cestui que trust* to follow trust funds and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced and identified, and provided the rights of *bona fide* purchasers for value, without notice, do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the the means of ascertainment fail. It is a question of title." [Cases cited omitted.]

And further said, on page 377:

> " * * * Although partners do not in the strict sense of the term occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a

relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a *cestui que trust.* (Per Jessel, M. R., In re Hallet's Estate, 13 Ch. Div. 696, 712.)"

In Collyer on Partnership, Sec. 324, it is said:

"Where upon the dissolution of a partnership, the partnership effects are not assigned, but the remaining partners continue to trade with the stock and capital of the original partnership, the profit and loss made by such trading must be brought into the account with the original firm. Thus, in an early case, Lord Keeper Harcourt declared, that, where one of two joint traders dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade. And by the short note of Hammond vs. Douglas, it appears that Lord Loughborough decided the very point. So, in Hill vs. Burnham, A and B being partners, A died, having by his will appointed B his executor. A's children then filed a bill against B for an account, and Lord Eldon declared that, the testator's trade having been carried on after his death with his capital, the plaintiffs were entitled to the profits in proportion to the shares they were respectively entitled to in his personal estate. So, where a dissolution of a partnership for a term of years was set aside as fraudulent after the expiration of the term; the business having been in the mean time continued, it was held that the partner who had been improperly excluded had a right to an account, not only to the end of the term, but till a final settlement should take place."

[Authorities cited in the notes are omitted.]

Chancellor Kent in the Third Volume of his Commentaries (12 Ed.) at page 73-4 [bottom pages] says:

"If, however, before a sale or a settlement of the joint concern, the partner in possession of the capital continues the trade with the joint property, he will do it at his own risk, and will be bound to account with the other partner, or the representatives of a deceased partner, for the profits of the trade, subject to just allowances."

In 2 Bates on Partnership §794, it is said:

> "If, after dissolution, one or some of the partners continue the business with the capital of the former associates, or engage the assets in new ventures, they can be held answerable to the other partners, or their representatives if dead, bankrupt or lunatic, for a share of the profits thereby earned, whether the dissolution was by the bankruptcy of a partner, death, lunacy, retirement, abandonment, expulsion or otherwise."

[Numerous authorities are cited in note to support the text.]

In 136 Mass. 263, Freeman vs. Freeman, the Court by C. Allen, J. said:

> "Letters patent belonging to a firm are to be dealt with, on a dissolution of the firm, like other partnership property. If used by a surviving partner for the purpose of profit, he will be held to an account, as in other cases of using assets of the firm; * * *"

In 18 N. J. Eq. 386, Hartman vs. Woehr et al., the Chancellor said:

> "Hartman, being a partner, is entitled to an account of the profits. Even where the partnership has been legally dissolved, and one of two partners continue to carry on the business, unlawfully using the property of the other in it, the retiring partner is, at his option, entitled to his share of the profits made while his property is thus used; this is settled by a series of well considered cases. See Story on Part. Sec. 343; Collyer on Part. Sec. 324."

The rule in varying language and circumstances as above laid down is eminently just. It was Hannaman as much as Karrick that helped to make the profits; the business belonged to one no more than to the other. Hannaman has a peculiar right, under the circumstances, to have the above rule applied in this case; he insisted, from the moment Karrick took forcible in possession, participating in the

partnership business, and continued such assertions ever after. Even when Hannaman brought suit, and issue was joined, he had every reason to believe there were no profits, as Karrick in his answer swore there were none.

POINT II.

In the second place a partnership formed for a definite unexpired period, cannot be terminated at any time by either party without cause.

An able discussion of this question is found in 23 Am. Law Register (N. S.) 689, by Benjamin Rex, and much that might be said here on this question is omitted, relying on the court to read the article.

In brief, the author arrives at the result, in view of all authorities, that the rule [the one appellee contends for.] sanctioned by the united voice of the Roman, the French, the Scotch and the English jurists, and above all by the voice of honor, is now the established rule in America.

In Story on Partnership, at Sec. 275, it is said:

> "In cases, where the partnership is by the agreement to endure for a limited period of time, the question, whether it may within the period be dissolved by the mere act or will of one of the partners, without the consent of all the others, does not seem to be absolutely and definitely settled in our jurisprudence, although it would not seem, upon principle, to admit of any real doubt or difficulty. Whenever a stipulation is positively made, that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement, and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation It is no answer to say, that such a violation of the engage-

ment may entitle the injured partners to a compensation in damages; for, independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious, that the remedy may be, nay, must be, in many cases utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a court of equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *sua sponte*, from mere caprice, or at his own pleasure, to dissolve the partnership. In short, the opposite doctrine, although perhaps in some measure countenanced by the Roman law, is founded upon reasons exceedingly artificial, if not indefensible. It proceeds upon a ground which cannot be maintained in common sense or justice, that any partner has a right to found his own claim to immediate indemnity and safety upon a known injury to the rights and interests of his co-partners, whatever may be the nature or extent thereof."

In 60 Miss. 576, Berry vs. Folkes, it is said:

"A partnership may be dissolved at the will of either partner, unless there be a distinct covenant against the exertion of this right, or unless manifestly contrary to the clear understanding and agreement of the parties."

In 13 N. J. Eq. 302, Van Kuren v. The Trenton etc. Co., it appeared that plaintiff and defendants formed a partnership for twelve years, and before its expiration, the defendants forcibly excluded the plaintiff from the business; plaintiff secured an injunction, and one of the questions involved was whether it should be dissolved.

The Chancellor on page 306 said:

" * * The agreement, whether it constituted a partnership or not, was by its terms, to continue for twelve years, unless sooner annulled by mutual consent; and the defendants clearly could not determine the contract of their own motion and forcibly exclude the defendant [plaintiff] from the possession and enjoyment of his rights. * *"

In 18 N. J. Eq. 383, Hartman v. Woehr et al., a part-

nership was formed for the period of five years, and before its expiration, the defendants ejected the plaintiff from the partnership business. The plaintiff afterwards brought an action for an accounting and dissolution.

The Chancellor on page 386 says:

> " * * The defendants had a remedy if he [plaintiff] did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this agreement, he was a partner for five years, unless the partnership was sooner dissolved. It was not dissolved by the advertisement of January 31st, or by excluding him from the management of the concern. This may constitute good cause for dissolution; and as he prayed for it, and the defendants deny his interest and refuse to admit him as a partner, the dissolution must be decreed."

The case in 5 Ark., 270; (39 Am. Dec. 376) Howell vs. Harvey, is discussed in the above quotation from the American Law Register: but it is desired to quote more fully from the opinion. On page 381-2 (39 Am. Dec.), the court by Lacy, J., says:

> "A partnership for a limited period of time cannot be dissolved at the mere pleasure of one of the parties, within the time prescribed. On the contrary, it can only be dissolved from just motives and for a reasonable cause. There is an implied understanding that the partnership shall continue to the expiration of the term, unless where one partner fails in his engagements, or any habitual infirmity renders him unfit to carry on the business, or where the renunciation is for the benefit of the partnership and not for the advantages of the dissolving partner The principle here stated is extracted from all the authorities by Justice Story, and fully approved by him in his complete and admiral treatise upon partnerships. In cases where the partnership is to endure for a limited period of time, the question, whether within that period it may be dissolved by the mere act and will of one of the partners, without the consent of the others, is not definitely or absolutely settled, says Justice

Story, in our jurisprudence. He clearly intimates, if ever such a case should arise, where one partner claimed the right, *sua sponte*, of dissolving the partnership, that he possesses no such power: and he takes the distinction between a court of equity dissolving the partnership, and that of a partner, acting upon his own caprice and pleasure, dissolving the engagement. He admits the doctrine to be somewhat different according to the Roman law; but he denies that a partner has a right to found his own claim to immediate indemnity and safety by committing a known injury to the interest and privileges of his co-partners: and in this opinion he is fully sustained by many elementary writers and a number of adjudged cases of unquestionable authority: Gow. on Part., c. 5, Sec. 1, 219, 225, 226, 288; 3 Coll. Part., b. 1, c. 2, Sec. 21, p. 62, 2d ed.; Kent's Com, Sec. 43, p. 61, 4th ed ; Peacock vs. Peacock, 16 Ves. 56; Crawshay vs. Maule, 1 Swans. 495; Pearpoint vs. Graham, 4 Wash. C. C. 234."

See also:

27 Ala. 245, Johnston vs. Dutton.

THE ONLY SUBSTANTIAL REASON URGED AGAINST THE FOREGOING ARGUMENT IS THE IMPOTENCY OF A COURT TO ENFORCE CORDIALITY BETWEEN INHARMONIOUS PARTNERS.

A court of equity will refuse to dissolve a partnership or appoint a receiver at the instance of the wrongdoing partner.

In 20 N. Y. Eq. 178, Seighortner vs. Weissenborn, the Chancellor said:

"But a partner who, by his own wilful misconduct, has caused such want of confidence, will not be allowed to take advantage of it to procure a dissolution. Harrison vs. Tennant, 21 Beav. 482; Baxter vs. Welsh, 1 DeG & Sm. 173; Lindley on Part. 185, 186; Collyer on Part., Sec. 297."

In 84 Ill., page 124-5, the court by Mr. Justice Scott said:

> "In all the cases we have examined, where the partnership has been dissolved on account of the unfriendly relations between the partners, it has generally been at the instance of a party who was not himself at fault, and where the estrangement was such as would prevent the successful management of the business. A party who is the author of the ill-feeling between himself and partners ought not be permitted to make the relation he has induced, the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty. The results flowing from the premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise."

The delinquent partner in such case is turned out of court unworthy of relief and refused a favorable decree; as often as such partner comes into court for relief, the Chancellor promptly refuses; consequently, as long as the other partner endures the wrongdoer, no relief is obtained in a court of equity, and the partnership would continue to exist as long as the partner without fault did not complain. But if the wrongdoer instead of appealing to the Chancellor for relief takes the matter in his own hands and forcibly ejects his partner, in other words declares and executes his own decree, then by some authorities there is a dissolution. There is no inherent virtue in the decree of the wrongdoer, there is in a court of equity; yet in practical results, the decree of the wrongdoer by such cases is superior to that of a court of equity. Logically a court should either grant the wrongdoer equitable relief at his instance, or else deny efficacy to his wrongful act, as both acts lead to the same result. There is a legal and logical inconsistency in turning the wrongdoer out of court without dissolution, yet vitalizing the dissolution the wrongdoer forcibly decrees.

If the impotency of a court of equity to enforce cordiality is a reason for recognizing the decree obtained *brutum fulmen*, then it should be a cogent reason to decree a suit of dissolution at the instance of the wrongdoer, but the authorities declare the contrary on fundamental principles of equity and inherent justice, and refuse virtue to the wrongdoer's act, and do not allow him to accomplish indirectly that which he could not directly. If Karrick cannot dissolve the partnership by a decree in equity, because in the wrong, then he cannot do so by his own decree. As opposed to the above it may be said that the wrongdoer after being turned out of court may still indirectly cause a dissolution by an assignment or sale of the whole business, and as he can do so, a court of equity should do likewise.

There are two complete answers to such fallacy:

(1) A court of equity never grants relief on the principle that the party rightfully turned out of court may in some wrongful manner accomplish the same result: if relief were granted on such principle, the days of wager of battle would have returned.

(2) It is fundamentally different to sell or assign the whole partnership business than it is to forcibly exclude a partner and continue the business. In the first case both parties go out together, stand upon equal footing, and the partner wronged receives as much as the other, because the wrongdoer then cannot reap the advantage of pocketing the anticipated profits *undivided*, which was the motive of the wrongful exclusion.

In the case where the business is continued, the wrongdoer recognizing the business as profitable and becoming more so, ejects his partner and dates a dissolution from such time: thus the business is continued, the profits

are accumulated undivided, and all done with partnership property. The cases are intrinsically different, in one, the business is closed; in the other, continued; in one the profits are not harvested; in the other, they are. On being ejected, Hannaman had his option to sue for a dissolution and receiver, or wait and sue for damages, or for an accounting. He sued for an accounting but in doing this he did not wait to see if the business was profitable or unprofitable; because he had every reason to believe when issue was joined the business was unprofitable.

As Karrick had no legal power to drive Hannaman out of the partnership, so he had no right to insist that Hannaman should accomplish the same thing by an immediate suit; these alleged rights are reciprocal, both could be done or neither; if Karrick could not drive Hannaman out, then it followed that Karrick could not insist on Hannaman bringing suit for dissolution.

The methods resorted to by Karrick are ancient—so are the results.

In 2 Lind. on Part. [2 Am. Ed.] at pages 1263-4, [bottom pages] it is said:

> "In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method, except a dissolution, by which a partner can retire against the will of his co-partners, so there is no method except a dissolution by which one partner can be got rid of against his own will.
>
> "**Driving a Partner to a Dissolution.**—The consequence of this is that when partners disagree and cannot dissolve, except with the concurrence of all, it is not unusual for some of them so to conduct themselves towards another as, if possible, to drive him to agree on a dissolution. But

> it need hardly be said that a scheme of this kind, will, if possible, be frustrated; and redress may be obtained in such a case without dissolving the partnership."

If appellant's brief is received in time to be answered, we may file a brief in reply in case there should be anything in it not answered in this brief.

It is respectfully submitted that this case should be affirmed.

JOSEPH L. RAWLINS,
PARLEY L. WILLIAMS,
Attorneys for Appellee.